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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 984

STERLING EDWARD NEWCOMB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 327 F.2d 649.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1964 (Pet. App. B). A petition for rehearing (Pet. App. C) was denied on March 13, 1964 (Pet. App. D). The petition for a writ of cer-

tiorari was filed on April 9, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was probable cause for the arrest of petitioner and a co-defendant without a warrant, so as to justify a search incident to the arrest.

2. Whether the court properly refused to compel disclosure of the identity of a government informant, where the government relied upon corroborating circumstances for its showing of probable cause.

STATEMENT

In an indictment returned in the United States District Court for the Southern District of California, petitioner and defendants Harding and Brining were charged in counts 1 and 5 with counterfeiting $10 and $20 Federal Reserve notes in violation of 18 U.S.C. 471 (R. I, 2, 6); and in counts 3, 4, 6, and 7 with violating 18 U.S.C. 474 by possessing and photographing counterfeit notes, and by possessing plates to be used for counterfeiting $10 Federal Reserve notes (R. I, 4, 5, 7, 8). The jury found petitioner guilty on counts 1, 3, 4, 5, 6, and 7, and concurrent five-year sentences were imposed under each of them (R. I, 49, 50). On appeal the conviction was affirmed (R. I, 51-52; Pet. App. B).

1. Petitioner and his co-defendants filed motions to suppress as evidence the counterfeit currency and counterfeiting equipment and paraphernalia seized by the government agents after the arrest of petitioner

and Brining on June 28, 1962 (R. I, 18-19, 11-12; 23-26). The pertinent evidence may be summarized as follows:

On June 27, 1962 Secret Service agent Thompson met with an informant who told him that at Precision Products Company, in Long Beach, California, a business for the sale of doors and other construction items, the petitioner and defendants Harding and Brining had been counterfeiting $10 bills for two or three months (R. II, 10-11). The informant described the individuals and related the police record of two of them (R. II, 11, 12). He stated that petitioner was driving a two-door bronze-colored 1961 Corvair Monza; that Brining was driving a white 1962 Chevrolet pick-up without license plates; and that Harding had a blue 1961 Corvair, as well as several other cars (R. II, 12, 74-75). The Corvair Monza and the 1961 Corvair were later seen parked near Precision Products, and checks of the license numbers with the motor vehicle records disclosed that these vehicles were registered to petitioner and Harding, respectively (R. II, 13). The informant told Thompson that Brining had a financial interest in the operation and was assisting petitioner, who was printing the counterfeit notes (R. II, 80-81).

In investigating the matter agent Horn learned from an official of the Carpenter Printing Company that on May 11, 1962, Precision Products had purchased, under petitioner's name, 1,000 sheets of 8½ by 11, No. 20 Lancaster, 100% rag bond paper, which is similar in quality to the paper used in regu-

lar government currency (R. II, 137-141). On May 31, 1962 petitioner had purchased 2,500 sheets of 8½ by 11, 25% rag bond (Ivory) paper (R. II, 140). Many counterfeiters print their notes on both 100% and 25% rag bond paper (R. II, 143).

On June 27, 1962, at about 5:00 p.m., agents took up surveillance at Precision Products and remained there until about 1:00 a.m. (R. II, 112). One agent testified to seeing a fluorescent light shining through the curtain at the front of the building (R. II, 103). At about 9:30 that night, agent Thompson and two other agents went to an apartment house at 24 Sixth Place in Long Beach, the address given by the informant as that of petitioner and Harding (R. II, 14, 61). Agent Thompson saw a Chevrolet pickup truck, without license plates, in the underground garage at that address. Petitioner and Brining were seen moving a large cardboard box from the stair well to the pickup truck, and shortly afterward Brining drove the truck away. Thompson knew the man was Brining from the description given earlier by the informant. (R. II, 14-15, 22-23, 75-76).

On that same evening (June 27) a check of police records showed that petitioner had been convicted of robbery and given a sentence of five years to life; that he had another sentence of six months to 50 years for statutory rape; and that his occupation at the time of arrest by the Long Beach Police Department was that of lithographer or printer (R. II, 22). Earlier that afternoon it had been ascertained from the records at the Los Angeles County Sheriff's Office

that Harding had a 1952 felony conviction for burglary (R. II, 21-22).

On June 28, 1962, at approximately 8:00 a.m., agents Thompson, Horn, Weaver, and Sheridan took up the surveillance of Precision Products, with Thompson and Horn posing as salesmen of a nearby car ageney and the other agents occupying a deserted building about 50 feet from the front door of Precision Products (R. II, 16-17). The rear windows of the Precision Products building were 12 feet above the ground, and the front windows were heavily draped (R. II, 213). When the agents arrived, the 1961 Corvair Monza, registered in petitioner's name, was parked about 10 feet north of the building (R. II, 18-19, 13). Shortly after the surveillance began, petitioner was seen to leave the front door, walk to the Corvair Monza, remove a small box,[1] and return to the building (R. II, 19). At about 9:45 a.m., Brining drove up in the 1962 pickup and walked to the Precision Products building. The door had to be unlocked from the inside before Brining could enter (R. II, 19-20). The only persons observed entering or leaving the building were petitioner and Brining (R. II, 20, 60).

Agent Thompson went to a nearby telephone to call an Assistant United States Attorney for the purpose of obtaining a search warrant (R. II, 21, 63). While

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[1] This box was apparently the package petitioner had removed from the trunk of his car. It proved to contain a plaster set of some ceramic figures and had no relation to this case (R. IV, 195, 202-203).

Thompson was conversing with the Assistant United States Attorney, petitioner was seen to leave the building, place something inside his car* and then enter on the driver's side. Sheridan, identifying himself as a federal officer (R. IV, 196), then placed petitioner under arrest and handcuffed him (R. II, 184-185). Agent Horn went to the rear of the building to make certain that no one was leaving (R. II, 169).

Immediately after petitioner's arrest, agent Weaver tried the front door by rattling it (R. II, 185). He informed agent Sheridan that the door was locked, and Sheridan requested from petitioner the keys to the building (R. II, 188). Inside, behind the draped window, the agents saw a person (Brining) pull the drapes aside, look out, and quickly draw them back to a closed position (R. II, 185, 187-188). From that vantage he could have seen handcuffs being placed on petitioner, whose hand was on the steering wheel (R. II, 185, 187, 203). The agents feared that the person inside might try to destroy incriminating evidence or attempt to escape after he saw that petitioner had been arrested (R. II, 186-187, 214-215).

Agent Weaver then pushed the front door of Precision Products open (R. II, 185, 199-200). Agent Horn, having returned from the rear of the building,

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* Agent Sheridan testified at the trial that when petitioner left the building to get in the car he had a large checkbook with some papers in it (R. IV, 201). In a search of petitioner's car Sheridan found Gov. Ex. 20, an invoice showing the sale of a quantity of bond paper to Precision Products (R. IV, 198).

was directly behind Weaver (R. II, 169, 208). Upon entering the building the officers saw Brining sitting at a desk in the front room near the window (R. II, 215-216). The agents announced that they were federal officers and that Brining was under arrest (R. II, 207-208, 172-173, 185).

The front office where Brining was arrested was about 20 feet long and 10 feet wide, and partitioned off except for a door leading to the back portion of the building (R. II, 174). After passing through the front office agent Weaver entered the plant area of the building, where he observed a camera and a printing press (R. II, 216, 217). A small dark room was located in the rear, but the door to this was either stuck or locked (R. II, 217, 218). Agent Weaver testified that he felt that someone might be in that room, since earlier that morning the agents had seen a man who fit Harding's description near the building (R. II, 218, 182). Petitioner, when brought into the building, advised the agents that the door to the dark room sometimes stuck and a knife or screw driver was needed to get into it. Agent Horn eventually entered the dark room by means of such an instrument and found counterfeit currency stacked inside (R. II, 191).

The government stipulated that the arrests of both petitioner and Brining on June 28, 1962 were made without warrants, and that the subsequent search of the Precision Products building was not pursuant to a search warrant (R. II, 6).

2. On the cross-examination of agent Thompson, petitioner's counsel requested the name of the informant. Government counsel invoked the privilege against disclosure of its confidential source. (R. II, 24-25). The agent stated that although the informant had previously supplied information regarding the three defendants, he had never been used as a reliable informant in any other case (R. II, 27-28). When petitioner's counsel asked if the informant told the agent that he had seen any paraphernalia, plates or counterfeit money at petitioner's premises, the government objected that these facts might serve to identify the informant (R. II, 38-39). In the colloquy which followed, government counsel said that the informant did "not have any prior or previous reliability as far as the government is concerned * * *" (R. II, 43). Government counsel agreed with the court's statement that the government's position was "to prove the reliability of the informer by corroborating his statement prior to the arrest * * *" (R. II, 109). The informant was not revealed.

3. The district court found that the information furnished by the informant had been corroborated to such an extent by subsequent investigation by the arresting officers that there was sufficient probable cause for the arrest. The court held (R. I, 39):

> There having been a lawful arrest, the search which followed was also lawful as incident to the arrest. The breaking down the door and the search of the entire building were justifiable under the circumstances here existing in that

having been compelled to show their hand by making the first arrest and especially after having seen the furtive glance of one inside the building peering through the drapes, the officers were justified in following up as quickly as possible in order to obtain evidence lest it be destroyed. Having entered, the search of the entire building—which incidentally is a commercial establishment and not a residence—the Court finds to be justifiable and therefore lawful.

ARGUMENT

1. The investigation conducted by the agents prior to the arrest of petitioner and Brining so thoroughly corroborated the information they had received that, as the courts below held, the totality of their information constituted probable cause to arrest the men without a warrant when they saw petitioner about to drive away from the building where the agents believed counterfeit money was being made. The investigation showed that the informant had been accurate in his description of the men and correct as to the address where they lived, and that Precision Products, the doors of which were kept locked during business hours, was not actually engaged in the business of selling construction materials. The agents learned that petitioner was a lithographer and had purchased for Precision Products large amounts of the type of paper used for counterfeiting. They had received confirmation of the prior records of the men and had observed petitioner and Brining move a large cardboard box from petitioner's apartment to Brining's truck at night. They thus had good reason to believe what the

informant had told them. When the agents saw petitioner about to drive off, they could not be certain either that he did not have counterfeit bills or that he would return. There was thus good reason to arrest the petitioner without a warrant. Since the arrest was made in full view of Brining inside the building, it became necessary to arrest Brining as well. And the search of the commercial building in which Brining was arrested was justified as incident to the arrest. *United States* v. *Rabinowitz*, 339 U.S. 56.

2. The trial court properly refused to compel the government to disclose the name of its informant. The situation here does not, as petitioner claims, fall within this Court's ruling in *Roviaro* v. *United States*, 353 U.S. 53, since the informant was not a witness to the events on which the indictment was based. Nor is this a case in which the confidential information was relied upon as the sole basis for an arrest or search without a warrant, a situation in which disclosure has in some instances been required as bearing on the question of good-faith reliance. See *Costello* v. *United States*, 298 F.2d 99, 101 (C.A. 9). Here, however, the government did not claim that its informant was of proven reliability, but merely that the independent corroborating information was sufficient to give credence to the "tip". On that issue the name of the informant would have been of no assistance to the petitioner. Disclosure of the identity of the informant was thus not required. *Scher* v. *United States*, 305 U.S. 251, 254; See *Rugendorf* v. *United States*, No. 223, this Term, decided March 30, 1964.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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